

BOFAXE

IN DUBIO CONTRA BELLUM (PART 1)

Why the Prohibition to Use Force will survive Turkey's operation Peace Spring

— What does Turkey's operation "Peace Spring" against Kurdish militias in Northern Syria and the subsequent reactions of the international community mean for the prohibition on the use of force? "The right to self-defence may be regarded as broadened now," some fear (e.g. [here](#)). But can the law regulating the use of force in international relations change so easily in the face of this intervention and careful reactions of the international community? No, we argue, it cannot. The prohibition to use force is more robust than widely believed.

Turkey's operation is a serious violation of international law (see for example [here](#), [here](#), [here](#) and [here](#)). Still, Turkey [claims](#) it was justified under the right to self-defence. Remarkably, whenever States illegally resort to military force in their international relations, whenever they wrongfully invoke exceptions like the right to self-defence, commentators worry that this behaviour might eventually weaken the validity of the prohibition on the use of force.

Of course, state practice can change international law to the extent that there is corresponding *opinio juris*. If Turkey advances a broader reading of the right of self-defence and if the international community accepts or acquiesces in it, the law may change. State practice and *opinio juris* are the constituting elements of customary international law (CIL). Accordingly, CIL does not only govern the behaviour of states but is at the same time formed by it. Jellinek's formula of the "normative power of the factual" describes this interdependence of reality and normativity in international law to the point. Similar considerations apply to the interpretation and the evolution of treaties. Presumably, it is this interdependence that is one of the main reasons why commentators have [urged the international community to take a strong and unequivocal stand](#) against the Turkish illegal use of force in Northern Syria. Failing to do so in the view of blatant violations of the prohibition on the use of force, they fear, would risk that "this cornerstone [of international law] begins to falter".

But how strong is the normative power of facts when it comes to violations of the prohibition on the use of force and unjustified invocations of exceptions to this rule? After all, the International Court of Justice referred to the prohibition as "[a cornerstone](#)" of the [United Nations Charter](#) and it is [considered by many to constitute a peremptory norm](#) of international law. In general, the threshold for change in international law is high, even for rules of lesser significance. [Article 38 \(1\) \(b\)](#) of the ICJ Statute requires "*general practice accepted as law*". Hence, it is accepted that practice must be consistent and widespread in order to crystallize into CIL. Isolated incidents claimed to be in accordance with international law (here by Turkey) are not enough. However, there is a certain interdependence between state practice and *opinio juris*. The two requirements are believed to rest on a [sliding scale](#), i.e. when state practice is limited, the identification of customary international law might need to rely to a greater extent on *opinio iuris*, and vice versa. Hence, the international community's reactions can increase the relevance of breaches of international law for a change of the law. If the reactions to Turkey's operation would have been overwhelmingly positive, the significance of the operation for the prohibition on the use of force would be much greater. As the International Law Commission [states](#) (at 139): "[a]cceptance as law (*opinio juris*) is to be sought with respect to both the States engaging in the relevant practice *and those in a position to react to it*" (emphasis added).

Thus, when assessing the current status of the prohibition on the use of force and the exception of self-defence, looking at other states' reactions to illegal operations like "Peace Spring" is crucial.